a legal justification or excuse to offer in his defense, he should be held liable for the actual injury caused to the other contracting party. Such a legal justification or excuse might exist, where the act of the defendant was done with good motives. Of course, in order to prevent the infliction of injustice, the maliciousness of the defendant's act must be clearly proved. Our conclusion is that, having regard to the prevailing general principles of tort liability and with a view of avoiding inconvenient inconsistencies, it may be doubted whether the courts of this state ought to or would follow the unfortunate decision in Boyson v. Thorn, if the question there considered were again squarely presented for discussion.

T. A. J. D.

WATER RIGHTS: ACTION BY RIPARIAN OWNER AGAINST NONRIPARIAN OWNER AT COMMON LAW.—Under the common law, water rights cannot be acquired against a riparian owner for nonriparian use through prior taking or appropriation.[1] Grant, condemnation or prescription may give nonriparian rights, but otherwise rights in the stream are confined to the riparian owners (owners of the bordering lands), among whom it is to be enjoyed equally upon their riparian lands as a matter of common right at any time.[2] Exclusion of nonriparian owners is irrespective of use or nonuse by riparian owners.[3] This is enforced east of the Mississippi Valley, and also in many States west of it, such as California, so far as grant, condemnation or prescription (or other special circumstances) have not grown up as a bar.

Whether the riparian owner need show damage is a controverted question. Any diminution of flow whatever (it is usually held) for nonriparian use, violates the riparian right, unless the diminution be so comparatively slight as to be beneath serious notice, (the rule *"de minimis non curat lex"*).[4] From the standpoint of the community of riparian owners from source to mouth, this preserves the stream for many against one, which social reason founds the riparian doctrine. As a controversy, however,

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[1] Mason v. Hill, 5 Barn. & Adol. 1; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674.

[2] Tyler v. Wilkinson, 4 Mason 397, Fed. Case No. 14312; Turner v. James Canal Co., 155 Cal., 82. 99 Pac 520.

[3] Lux v. Haggin, supra; St. Germain Co. v. Hawthorn Ditch Co., (S. Dak.), 143 N. W. 124.

[4] Webb v. Portland Cement Company, 3 Summer 189, Fed. Case 17322; Gardner v. Newburg (N. Y.), 2 Johns Ch. 164, 165; Creighton v. Evans, 53 Cal. 56; Moore v. Clear Lake Water Company, 68 Cal. 146, 8 Pac. 816; Heilbron v. Ditch Co., 75 Cal. 121, 17 Pac. 65; Gould v. Eaton, 117 Cal. 539. 543, 49 Pac. 577; Hargrave v. Cook, 108 Cal. 72, 41 Pac. 18; Anaheim Union Water Co. v. Fuller 150 Cal. 327, 88 Pac. 978; Duckworth v. Watsonville Co., 150 Cal. 520, 89 Pac. 338; Shurtleff v. Kehner, 163 Cal. 24, 124 Pac. 724; Roberts v. Martin, (W. Va.), 77 S. E. 535.

between the appropriator and the single riparian owner who is complaining, it may stop supplying one's house, barn, or fields or water-wheels at suit of another standing alone, who himself makes no use whatever. This has been called a doctrine of "dog in the manger", "absurd", "startling", "a phantom", and even "monstrous".[5]

Because of this, the "Colorado Doctrine" has wholly abrogated riparian rights.[6] To get around hard cases in the others, such as California and other common law states, some rulings require proof of damage to the riparian land. A ruling of Chief Justice Shaw in Massachusetts laid this down,[7] and in England there was a similar case.[8] Later years subordinated these in their own jurisdictions.[9] But the discussion continued in California[10] and now the Supreme Court of Massachusetts in *Stratton v. Mt. Herman Boys School*[11] has reopened the question there also. Water was being taken by defendant to supply a boys' school beyond the watershed, and, as plaintiff's water-power suffered therefrom and defendant was taking more water every year, a verdict for damages was sustained. The nonriparian use was held wrongful. But the opinion declares at considerable length that such diversion could have been made if it "occasions no injury to the present or future use of the lower riparian land"; or if it could not have produced even "potential" injury. In view of the actual decision awarding damages, this is dictum only, but it is laid down with much stress, as in a like California case declaring the same rule and closing the same way with a short sentence making it inapplicable to the case decided.[12] The recent Massachusetts case is of further interest in recognizing the watershed as the boundary of riparian land. Western courts (founded on an English case[13]) have recognized this for some time.[14] The

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[5] Kensit v. Great Eastern Ry., 27 Ch. Div. 122; Drake v. Earhart, 2 Idaho 716, 23 Pac. 541; Wiel, Water Rights in the Western States, 3d ed. secs. 112, 168, 824.

[6] Wiel, supra, 3d ed. sec. 118.

[7] Elliot v. Fitchburg R. R., 10 Cush. (Mass) 191.

[8] Kensit v. Great Eastern Railway, supra.

[9] McCartney v. Londonderry Ry, (1904), App. Cas. 301; Stimson v. Inhabitants of Brookline, 197 Mass. 568, 83 N. E. 893.

[10] Modoc L. & L. Co. v. Booth, 102 Cal. 151, 36 Pac. 431; San Joaquin etc. Co. v. Fresno Flume Co., 158 Cal. 626, 112 Pac. 182; Gallatin v Corning Irr. Co., 163 Cal. 406, 126 Pac. 864.

[11] 103 N. E. 87.

[12] San Joaquin etc. Co. v. Fresno Flume Co., supra.

[13] Swindon W. W. Co. v. Willts etc. Co., L. R. 7 H. L. 697.

[14] Chauvet v Hill, 93 Cal. 407, 28 Pac. 1066; Silver Creek etc. Co. v. Hayes, 113 Cal. 142, 45 Pac. 191; Wiggins v. Muscupiabe Water Co., 113 Cal. 182, 45 Pac. 160; Bathgate v. Irvine, 126 Cal. 136, 58 Pac. 442; Southern Cal. etc. Co. v. Wilshire, 144 Cal. 68, 77 Pac. 767; Pomona W. Co. v. San Antonio W. Co., (dictum), (1908), 152 Cal. 618, 93 Pac. 881; Miller v. Bay Cities etc. Co., 157 Cal. 256, 107 Pac. 115; Wiel, Water Rights in the Western States, 3d ed., sec. 773.

Massachusetts court says it had not before been decided in that commonwealth, and adopts the California rule.

Damage as an element in violation of riparian rights has never been considered dependent upon "present" damage.[15] The controverted question is whether "possible future" damage must be shown; such deterioration of the riparian land as might reduce its value or impair its susceptibility for use in the future. In this the turning point is the word "possible". To show that, where none is visible yet, damage may or may not be possible in the future may be itself impossible, for title to land lasts forever ("to have and to hold unto his heirs and assigns forever"). In the future everything is possible; no one without the gift of prophecy can say what the future may or may not bring forth. The most we can say is that, in view of past experience, damage may be so remote that its possibility is beneath serious notice.[16] But between that and the rule "de minimis non curat lex" the difference can not be great.

A recent Washington case recognizes the difficulty of estimating what damage may or may not happen in the future,[17] refusing thereupon an injunction and continuing the case to a future time until experience should show. But inability to measure damage is a familiar ground for equity to act instead of refusing to act, throwing the scale upon the side of the paramount right, and against the party who, like the nonriparian claimant, is necessarily upon the defensive. Equity usually will not force a paramount owner to assume a risk; if damage is impossible of ascertainment, that is of itself usually a ground for equitable interference.

As noted in a recent West Virginia case,[18] it may be that in good morals the riparian owner should take the risk voluntarily and not deny the use of the water to his nonriparian neighbors when not using it himself. But there is a rule in the common law against deciding cases upon motive or morals, for the law and morals are different forums.[19] The exclusion of nonriparian owners at common law consequently illustrates how a rule existing for a social reason and designed to preserve equality of right[20] may, when enforced, lie heavily upon individuals.

S. C. W.

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[15] Huffner v. Sawday, 153 Cal. 86, 94 Pac. 424; Wiel, supra, 3d. ed., Sec. 816.

[16] See Gallatin v. Corning Irr. Co., 163 Cal. 406, 126 Pac. 864, holding that the possibility of impounding flood waters in the future where no present plan exists, is too remote.

[17] Coulee etc. Co. v. E. V. Pluvious Co., (Wash. 1912), 134 P. 684.

[18] Roberts v. Martin, (W. Va.), 77 S. E. 535.

[19] See Ames, "Law and Morals", in Lectures on Legal History, p. 435.

[20] See Wiel, "Theories of Water Law", Harvard Law Review, April, 1914.